

109 FERC ¶ 61,293  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Puget Sound Energy, Inc.

Docket Nos. ER99-845-004  
ER99-845-005  
ER99-845-006  
ER99-845-007  
EL05-37-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION  
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 20, 2004)

1. On August 11, 2004, as amended on September 24, 2004 and November 19, 2004, Puget Sound Energy, Inc. (Puget) submitted for filing an updated market power analysis pursuant to the Commission's order issued on May 13, 2004.<sup>1</sup> The May 13 Order addressed the procedures for implementing the generation market power screens announced on April 14, 2004 and clarified on July 8, 2004.<sup>2</sup> In its compliance filings, Puget states that it passes both generation market power screens. However, the Commission finds that Puget's compliance filings are incomplete and have not provided adequate information for the Commission to determine whether Puget passes both generation market power screens. Specifically, the Commission finds that the simultaneous transmission import capability study included in Puget's filing fails to comply with the requirements set forth in Appendix E of the April 14 Order.

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<sup>1</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004) (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

2. Because we are unable to validate the results of Puget's generation market power analysis, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA)<sup>3</sup> to determine whether Puget may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Puget control area, since this is the relevant market for which our analysis indicates that Puget could fail the market power screen. The Commission further accepts Puget's tariff sheets submitted in Docket No. ER99-845-006 that include the Market Behavior Rules, as required by the Commission in a previous order.<sup>4</sup>

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

### **Background**

4. On January 29, 2002, Puget filed its three-year updated market power analysis in compliance with a January 29, 1999 Order conditionally accepting Puget's market-based rate tariff (January 2002 filing).<sup>5</sup>

5. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forgo the generation market power

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<sup>3</sup> 16 U.S.C. § 824e (2000).

<sup>4</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

<sup>5</sup> *Puget Sound Energy, Inc.*, 86 FERC ¶ 61,088 (1999).

analysis altogether and go directly to mitigation.<sup>6</sup> The May 13 Order directed Puget to file within ninety days of the issuance of that order generation market power analyses pursuant to these two indicative screens.<sup>7</sup>

6. On August 11, 2004, Puget filed a revised generation market power study to replace the generation market power analysis in its January 2002 filing in compliance with the Commission's May 13 Order (August 2004 filing). The compliance filing provided an analysis of Puget's generation market power in its home control area. On September 24, 2004, Puget submitted a supplemental study of its generation market power analysis in its first-tier control areas, and a study of its generation market power in the broader Pacific Northwest market (September 2004 filing).

7. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Puget's submittal.

8. On November 19, 2004, Puget filed a response to the data request (November 2004 filing).

### **Description of Puget's Filings**

9. Puget has provided a generation market power analysis pursuant to the requirements of the Commission's April 14 Order using its home control area and five interconnected first-tier control areas as the relevant geographic markets. Puget states that it passes both indicative screens in those markets. In addition, Puget provided a generation market power analysis for the expanded relevant geographic market consisting of the broader Pacific Northwest market. Puget states that it also passes both indicative screens for the Pacific Northwest market, but that it does not rely upon the use of the Pacific Northwest market in its market power studies.

10. Puget's November 2004 filing also included revised tariff sheets in which Puget incorporated into its market-based rate tariff the market behavior rules established by the Commission in its Market Behavior Rules Order.

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<sup>6</sup> In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. April 14 Order, 107 FERC ¶ 61,018 at P 37.

<sup>7</sup> May 13 Order, 107 FERC ¶ 61,168 at Appendix A.

### **Notice of Filing and Responsive Pleadings**

11. Notice of the January 2002 filing was published in the *Federal Register*, 67 Fed. Reg. 6,917 (2002), with interventions or protests due on or before February 19, 2002. None was filed.
12. Notice of the August 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 52,005 (2004), with interventions or protests due on or before September 1, 2004. None was filed.
13. Notice of the September 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 60,386 (2004), with interventions or protests due on or before October 15, 2004. None was filed.
14. Notice of the November 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. None was filed.

### **Discussion**

#### **Market-Based Rate Authorization**

15. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>8</sup>

#### **Generation Market Power**

16. In conducting its pivotal supplier and wholesale market share screens, Puget limited imports into the Puget control area, using the results of simultaneous transmission import capability studies that it performed for each season. Our review of Puget's filing indicates that the simultaneous transmission import capabilities provided by Puget may be overstated since the import limits calculated by Puget are the simple sum of the total transfer capabilities (TTC) of intertie facilities with adjacent entities. In the April 14 Order, the Commission indicated that simultaneous transmission import capability studies

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<sup>8</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

require a more comprehensive analysis than that which is based on TTCs.<sup>9</sup> Furthermore, our analysis indicates that Puget's simultaneous transmission import capability studies do not include short or medium term firm/network reservations controlled by Puget and its affiliated resources, which, together with the dependence on TTCs, demonstrates that Puget's simultaneous transmission import capability studies do not comply with the requirements set forth in Appendix E of the April 14 Order. Puget's potentially overstated simultaneous import capabilities could affect the results of the generation market power screens by inflating the amount of uncommitted capacity available from competitors in the wholesale market indicated in the screens. Based on its incomplete simultaneous transmission import capability studies, Puget's generation market power studies indicate that Puget passes the screens. However, if the import studies were performed as required by the April 14 Order, Puget could fail the screens.

17. Our preliminary analysis indicates that because Puget's simultaneous import capability study is incomplete, the Commission cannot validate the results of Puget's generation market power analysis to determine whether Puget passes the market share screens in the Puget control area. Puget's failure to comply with the April 14 Order provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the Puget control area, to determine whether Puget may continue to charge market-based rates in that market. Our decision to institute the instant section 206 proceedings does not constitute a definitive finding by the Commission that Puget has market power in the Puget control area.

18. Since there is a significant difference between the simultaneous transmission import capability calculations performed by the Commission and Puget, the Commission will give Puget the option to file, within 60 days from the date of issuance of this order, a revised simultaneous transmission import capability study for its home control area, which complies with the requirements of Appendix E of the April 14 Order. Alternatively, Puget may choose, within 60 days from the date of issuance of this order, to either: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstance that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>10</sup> In addition, as the Commission stated in the April 14 Order,<sup>11</sup> the applicant or intervenors may present

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<sup>9</sup> See 107 FERC ¶ 61,018 at P 83.

<sup>10</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

<sup>11</sup> 107 FERC ¶ 61,018 at P 37.

evidence such as historical sales data to support whether the applicant does or does not possess market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

19. Furthermore, in its filings, Puget includes weekends and NERC holidays in its calculations of native load proxies for the seasonal wholesale market share screens. The Commission hereby clarifies that weekends and NERC holidays may be excluded when determining the peak load day for each season because weekends and holidays are not typical load days. Therefore, the Commission will give Puget the opportunity, at its discretion, to file, within 60 days from the date of issuance of this order, revised seasonal wholesale market share screens which exclude weekends and NERC holidays from the calculation of proxies for native load obligations.

20. In addition, in its filings, Puget argues that the relevant geographic market is the broader Pacific Northwest market and not the Puget home control area alone. Puget may provide, within 60 days from the date of issuance of this order, at its option, additional justification for its contention that the broader Pacific Northwest market is a more accurate representation of the relevant geographic market. Since Puget states that it does not rely upon the use of the Pacific Northwest market in its market power studies, the Commission makes no finding in this order on the issue of the Pacific Northwest being the proper relevant market.

21. In cases where, as here, the Commission institutes section 206 proceedings on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,<sup>12</sup> the Commission will establish a refund effective date, at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceedings in Docket No. EL05-37-000, is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to

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<sup>12</sup> See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

### **Transmission Market Power**

22. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Puget states that it has an OATT on file with the Commission. We note that Puget's OATT was accepted in *AEP Operating Cos.*, unpublished letter order dated September 28, 1998 in Docket No. OA97-665-000. Further, no intervenor raises transmission market power concerns. Based on Puget's representation, the Commission finds that Puget satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

23. Puget states that it owns and operates gas distribution facilities in the State of Washington. Puget states that it understands that should Puget, or its affiliates, deny, delay, or require unreasonable rates, terms, or conditions for natural gas service to a potential electric competitor, then the Commission may suspend Puget's authority to sell electricity at market-based rates.<sup>13</sup> In addition, Puget states that it does not engage in discriminatory practices with respect to the provision of natural gas service. Further, no intervenor raises concerns regarding barriers to entry. Based on Puget's representations, the Commission is satisfied that Puget cannot erect barriers to entry.

### **Affiliate Abuse**

24. The Commission is also concerned with the potential for affiliate abuse. In its January 2002 filing, Puget states that it has on file with the Commission in its market-based rate tariff a prohibition against sales of electricity to, or purchases of electricity from, any of its affiliates without first making a filing with the Commission pursuant to section 205 of the FPA.<sup>14</sup> In its August 11, 2004 filing, Puget further states that it has no

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<sup>13</sup> See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

<sup>14</sup> 16 U.S.C. § 824d (2000). Consistent with Commission precedent, sales between a traditional public utility and its affiliates are not permitted without first receiving Commission authorization of the transaction under section 205 of the FPA. See *Aquila, Inc.*, 101 FERC ¶ 61,331, at P 7-9, 12 (2002).

affiliates that have authority to sell electricity at market-based rates. Further, no intervenor raises affiliate abuse concerns. Based on Puget's representations, Puget satisfies the Commission's concerns with regard to affiliate abuse.

### **Market Behavior Rules**

25. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.<sup>15</sup> Puget has amended its tariff to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. Accordingly, Puget has complied with this directive.

### **Reporting Requirements**

26. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>16</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>17</sup>

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<sup>15</sup> Market Behavior Rules Order, 105 FERC ¶ 61,218 at Ordering Paragraph (A).

<sup>16</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/Electric/eqr/eqr.htm>.

<sup>17</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.



27. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.<sup>18</sup> Accordingly, the change in status reporting obligation for Puget is subject to the outcome of the rulemaking.

The Commission orders:

(A) Puget's updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing, as discussed in the body of this order.

(B) Puget's tariff sheets that include the Market Behavior Rules are hereby accepted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes proceedings in Docket No. EL05-37-000 concerning the justness and reasonableness of Puget's market-based rates, as discussed in the body of this order.

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceedings under section 206 of the FPA in Docket No. EL05-37-000.

(E) The refund effective date established pursuant to section 206(b) of the FPA shall be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (D) above.

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<sup>18</sup> *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

(F) As discussed in the body of this order, Puget is hereby directed, for the Puget control area, within 60 days from the date of issuance of this order, to either: (1) file a revised simultaneous transmission import capability study which complies with the requirements in Appendix E of the April 14 Order; (2) file a Delivered Price Test analysis; (3) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (4) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission. Commissioner Kelliher dissenting in part, with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc.

Docket Nos. ER99-845-004  
ER99-845-005  
ER99-845-006  
ER99-845-007  
EL05-37-000

(Issued December 20, 2004)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I dissent from the part of this order that institutes a proceeding under section 206 of the Federal Power Act<sup>1</sup> in Docket No. EL05-37-000 concerning the justness and reasonableness of Puget Sound Energy, Inc.'s (Puget) continuing to charge market-based rates. In this order, the Commission does not find that Puget failed either indicative screen. Instead, the Commission finds that Puget improperly calculated simultaneous transmission import capability. In essence, the Commission is initiating a section 206 proceeding and setting a refund effective date for failure to properly administer our new market power test, not for failure of this test. Significantly, the Commission does not find that Puget acted in bad faith by failing to properly administer our test. I would afford Puget another opportunity to properly calculate simultaneous transmission import capability. Accordingly, I would not, at this time, initiate a section 206 proceeding in Docket No. EL05-37-000 or take any additional actions related to the initiation of the section 206 proceeding.

On a separate matter, I note that in the April 14 Order, the Commission stated it will first look to the control area market where the applicant is physically located to determine the default relevant geographic markets under both screens.<sup>2</sup> However, because we recognized that defining the relevant geographic market on a control area basis may not always be appropriate, we allowed applicants to demonstrate that some other geographic

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<sup>1</sup> 16 U.S.C. § 824e (2000).

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004) at P73.

market would be more appropriate.<sup>3</sup>

Puget now proposes a different geographic market for the Commission to consider in its evaluation of whether the Puget passes the indicative screens. I believe that Puget's proposed geographic market has merit and should seriously be considered.

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Joseph T. Kelliher

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<sup>3</sup> *Id.* at P75.